Supreme Court, U.S.
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NO.

In the Supreme Court of the United States

OCTOBER TERM, 1994

EMPRESA NACIONAL SIDERURGICA, S.A.,
Petitioner,

v.

JERRY YOUNG,
Respondent,

PETITION FOR A WRIT OF CERTIORARI TO THE LOUISIANA FOURTH CIRCUIT COURT OF APPEAL

PETITION FOR WRIT OF CERTIORARI

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39PP

QUESTION PRESENTED

Ostensibly applying the rules set forth in *Scindia Steam Navigation Co. v. De Los Santos,* 451 U.S. 156, 101 S. Ct. 1614 (1981), the Louisiana Fourth Circuit Court of Appeal extended the so-called "turnover duty" to make safe the vessel and its equipment owed by vessel interests to the discharging stevedore, to the method of stowage of the cargo. And, even though any dangers in the stow were concededly open and obvious, the Court rendered a judgment finding both the vessel owner and voyage charterer liable to a longshoreman who was allegedly injured during discharge operations. *Jerry Young v. Armadores de Cabotaje, S.A., et al.,* 617 So.2d 517 (La. App. 4th Cir. 1993).

On June 20, 1994, this Court issued a Writ of Certiorari to the Court of Appeal of Louisiana, Fourth Circuit whereby it was ordered that their judgment in this cause be vacated and the case be remanded for consideration in light of *Howlett v. Birkdale Shipping Co., S.A.,* 512 U.S. ____, 114 S. Ct. 2057, 129 L.Ed.2d 78 (1994).

In its amended opinion issued pursuant to the Writ, the Louisiana Fourth Circuit altered its fact findings and ruled that because of its minimal involvement in the stowage process the vessel owner should be absolved from liability, but that even though the hazards in the stow were again concededly open and obvious, the voyage charterer should now bear the entire liability.

Thus, the question presented is whether the amended decision of the Court of Appeal, Fourth Circuit, State of Louisiana, constitutes a proper response to the Writ of Certiorari issued by this Court.

LIST OF PARTIES

The following are the parties to this proceeding;

Jerry Young, plaintiff-respondent.

Empresa Nacional Siderurgica, S.A.,
defendant-petitioner

Cooper T. Smith Stevedoring Co., Inc.,
intervenor.

Armadores de Cabotaje, S. A., defendant,
was dismissed from the proceedings.

Pursuant to Supreme Court Rule 29.1, Empresa Nacional Siderurgica, S.A. states that it has no parent corporations or non-wholly owned subsidiaries.

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DECISIONS BELOW

The original opinion of the Court of Appeal, Fourth Circuit, State of Louisiana was issued on March 31, 1993, and is reported as *Jerry Young v. Armadores de Cabotaje, S.A., et al.*, 617 So.2d 517 (La. App. 4th Cir. 1993). After the Louisiana Supreme Court's refusal to hear the case, it came before this Court pursuant to a Petition for a Writ of Certiorari filed by petitioner's co-defendant.

This Court issued a Writ of Certiorari to the Court of Appeal, Fourth Circuit, State of Louisiana on June 20, 1994, vacating the judgment and remanding the case for further consideration in light of *Howlett v. Birkdale Shipping Co., S.A.*, 512 U.S. ____, 114 S.Ct. 2057 (1994). (Reported at 114 S. Ct. 2701, 129 L.Ed.2d 830, and see Appendices A, B and C).

The Court of Appeal, Fourth Circuit, State of Louisiana then issued an Order on August 15, 1994 requesting briefs adddressing the instructions contained in the Writ. (See Appendix D). Briefs were duly submitted. The Louisiana Fourth Circuit's amended opinion was issued on November 17, 1994. It is reported at 645 So.2d 1266 and is reproduced in Appendix E. Pursuant to the opinion, the judgment against Armadores de Cabotaje, S.A. (hereinafter "ARCASA") in the amount of 15% of the fault was set aside, but the judgment against Empresa Nacional Siderurgica, S.A. (hereinafter "ENSIDESA") was reinstated, and the amount of fault elevated from 85% to 100%. ENSIDESA requested a rehearing which was denied on December 13, 1994. (See Appendix F). An application for a Writ of Certiorari to the Supreme Court of

Louisiana was then submitted. This Application was denied on March 10, 1995, and is reported at 650 So.2d 1185, and reproduced in Appendix G.

JURISDICTION

The amended opinion of the Court of Appeal, Fourth Circuit, State of Louisiana, was entered on November 17, 1994. Rehearing was denied on December 13, 1994. The Supreme Court of Louisiana denied the Application for a Writ of Certiorari on March 10, 1995. The jurisdiction of this Court is thus invoked pursuant to 28 U.S.C. §1257.

STATUTORY PROVISION INVOLVED

The following statute of the United States of America is involved in this petition:

33 U.S.C. §905(b):

> In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any arrangements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the

vessel. If such person was employed to provide shipbuilding, repairing, or breaking services and such person's employer was the owner, owner pro hac vice, agent, operator, or charterer of the vessel, no such action shall be permitted, in whole or in part or directly or indirectly, against the injured person's employer (in any capacity, including as the vessel's owner, owner pro hac vice, agent, operator, or charterer) or against the employees of the employer. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

STATEMENT OF THE CASE

This case arises out of an injury allegedly suffered by an experienced longshoreman, Jerry Young, while offloading a vessel, the M/V LORENA, at the port of New Orleans, in November 1982.

The M/V LORENA, owned and operated by ARCASA, had been voyage chartered by ENSIDESA, the national steel company of Spain, for the purpose of shipping I-beams from Aviles, Spain to Louisiana. ENSIDESA, whose employees were to load the vessel at Aviles, prepared a stowage plan, which was approved by the master of the vessel. The 60 foot I-beams were then stowed in the "H" configuration according to Spanish custom so that looking down the length of the beams from the end they lie in tiers on their flanges resembling the letter "H".

Wooden dunnage was placed between the tiers or layers of beams in the normal way.

The cargo surveyor employed to inspect the stow at loading noted nothing unusual or dangerous. ENSIDESA employed Cooper T. Smith Stevedoring Co., Inc. (hereinafter "Cooper") to offload the vessel in New Orleans. On the vessel's arrival in New Orleans, Cooper's supervisory personnel inspected the vessel and her stow prior to commencing discharge operations. The supervisors gave their longshoremen employees, one of whom was Jerry Young, the approval to offload. The offloading operations proceeded without complaint from the longshoremen or their supervisors. No notations of any dangers in the stow were made in the relevant documentation, and because there was no packaging or covering as such, there was no difficulty with hidden or invisible areas in the stow. In fact, Jerry Young's foreman described the stow as "perfect" and "safe".

Cooper discharged the cargo with its crane barge, the LISA C, which was located between the M/V LORENA and the wharf. The longshoremen were in the holds of the vessel attaching the crane hooks to the bundles of I-beams. At approximately 2:00 p.m. on November 22, 1982, during the second day of discharge, plaintiff claims he sustained injury when a breakout wire used to lift the end of a bundle of beams slipped off, striking him. After plaintiff's injury, the remainder of the cargo of beams was discharged in the same manner, without incident.

Plaintiff filed suit in October 1984 against ARCASA alleging vessel negligence pursuant to the Longshore and

Harbor Workers' Compensation Act, 33 U.S.C. §905(b). In May 1985, the trial court granted leave to Cooper and its compensation insurer to file a petition of intervention seeking to recover compensation benefits paid to or on behalf of the plaintiff. In July 1985, plaintiff filed an amended petition against ENSIDESA alleging fault. In January 1989, ENSIDESA and ARCASA filed cross-claims against one another.

Trial by jury proceeded on April 17, 1989. The cross-claims of ENSIDESA and ARCASA were severed, as was Cooper's petition of intervention. At the trial, the foreman of plaintiff's work gang on the day of the accident testified that he saw nothing dangerous about the stow. He had seen that type of stow many times before, and said it was a "perfect," "safe" stow. All steel beams were loaded in the "H" method at the Port of Aviles in 1982, the year of Young's injury. This was ENSIDESA's customary method of loading from 1956 to 1985, a period of 29 years. Albert Ross, a "marine surveyor," testified on behalf of plaintiff. He inspected the condition of the cargo of steel beams on the M/V LORENA and testified that he could not recall ever seeing a ship stowed with steel beams in the "H" manner. Ross contradicted plaintiff's foreman, testifying that it was a "hazardous" stow, not a "correct" stow. Yet on cross examination, Ross said he had never been a stevedore or a longshoreman. He stated that he was aware that the foreman of plaintiff's gang thought the cargo stow was in perfect condition, and could not recall whether he had informed the Cooper superintendent that he thought the stow was dangerous while he was actually at the vessel. He also had to admit that earlier in February 1982 he may have surveyed the same M/V LORENA loaded with beams

stowed in the "H" configuration. He admitted that he did not know whether the condition of the stow had anything to do with plaintiff's accident.

The jury returned its verdict on April 26, 1989, finding ENSIDESA 85% and ARCASA 15% at fault in causing plaintiff's damages. The jury awarded plaintiff $1,700,000.00 in damages, and the trial court subsequently held that neither ENSIDESA nor ARCASA was entitled to indemnity and/or contribution from the other. The parties ultimately agreed to the amount of the intervention sought by Cooper and its insurer.

ENSIDESA and ARCASA timely filed motions for judgment notwithstanding the verdict, or alternatively, for new trial. The motions were denied by the trial court on September 1, 1989. ENSIDESA and ARCASA thereafter moved for reconsideration of the trial court's refusal to remit the damages award. The trial court denied this motion as well and entered final judgment on October 6, 1989.

ENSIDESA and ARCASA timely appealed to the Louisiana Court of Appeal for the Fourth Circuit. On March 31, 1993, the Fourth Circuit issued its opinion and ruling, reversing in part, amending and affirming as amended the judgment of the trial court. The ruling was based on the finding that even though the hazards in the stow were open and obvious, the defendants had breached the "turnover duty" to the stevedore. The Fourth Circuit however reduced plaintiff's damages to $1,106,046.00, but denied ENSIDESA relief from the trial court's multiple abuses of discretion. The Fourth Circuit went even further, however, to hold that although the jury found ARCASA to

be 15% negligent, ENSIDESA owed indemnity to ARCASA for ARCASA's own negligence, despite the lack of any clear or specific language in the applicable charter to that effect. ENSIDESA's Petition for Rehearing was denied on May 12, 1993.

Thereafter on July 11, 1993, ENSIDESA filed an Application for Writ of Certiorari or Review to the Louisiana Supreme Court. Both plaintiff and co-defendant ARCASA also filed timely writ applications. The Louisiana Supreme Court denied all three writ applications on October 1, 1993.

As a result of this denial, both ENSIDESA and ARCASA applied to this Court for a Writ of Certiorari raising issues of procedural and substantive law. ARCASA's application was docketed on December 23, 1992, and ENSIDESA's on December 28, 1993. While ENSIDESA'S petition was denied, ARCASA's was granted on June 20, 1994, in the following terms:

> [I]t is ordered and adjudged by this Court that the judgment of the above court in this cause is vacated with costs and the case is remanded to the Court of Appeal of Louisiana, Fourth Circuit, for consideration in light of *Howlett v. Birkdale Shipping Co., S.A.*, 512 U.S. ____ [1994].

(Reported at 114 S. Ct. 2701, 129 L.Ed.2d 830). (See Appendix C).

Consequent upon this ruling, the Fourth Circuit issued an Order on August 15, 1994, requiring the parties

to submit briefs. (See Appendix D). The Court noted that "[o]ur reconsideration of this case will be strictly limited to the issues affected by this recent U.S. Supreme Court decision." All parties submitted briefs on remand. On November 17, 1994, the Fourth Circuit issued its judgment, reversing in part, amending and affirming as amended its earlier judgment. (See Appendix E).

The Court conceded that the hazards in the stow, if any, were open and obvious and that there could therefore be no breach of the corollary to the turnover duty, *i.e.* the turnover duty to warn. However, they concluded that the fact that the hazards were open and obvious had no bearing on the turnover duty itself, and that this duty extended to the cargo as well as the ship. They then decided that because ARCASA played a "minimal role" in the preparation of the stowage plan, ARCASA's 15% fault should be set aside, and ENSIDESA should now be found 100% at fault for breaching the turnover duty. The judgment was amended accordingly.

On December 1, 1994, ENSIDESA applied for a rehearing, which was refused on December 13, 1994. (See Appendix F). ENSIDESA timely filed an Application for a Writ of Certiorari in the Supreme Court of Louisiana, seeking to require the Louisiana Fourth Circuit to follow this Court's Writ. This Application was denied on May 10, 1995. (See Appendix G). Hence this Petition.

REASONS FOR GRANTING THE WRIT

The primary reason for granting this Petition is that the Court to whom this Court's prior Writ was addressed

did not follow the instructions contained therein. The Louisiana Fourth Circuit misapplied the clear exposition of the law as set forth in *Howlett* and then used specious logic to reinstate and rearrange the judgment that this Court vacated. Their findings that the "open and obvious" defense does not apply to the turnover duty, and that the turnover duty extends to the cargo are both incorrect, and the use of the "minimal role" criterion is simply a device used to achieve a desired result, and is nowhere to be found in *Howlett.*

It is submitted that in *Howlett*, this Court reinforced the original formulation of the vessel interests' duties to longshoremen that were so narrowly articulated by Justice White in *Scindia.* In *Scindia* he set forth a broad statement of vessel *immunity,* tempered by a number of closely difined *exceptions,* the so-called *Scindia* duties. The reasons for creation of this framework have been well documented. The entire legislative intent embodied in the 1972 amendments to the Longshore and Harbor Workers' Compensation Act was firstly to place most of the responsibility for injuries to longshoremen on the stevedores themselves, where, according to this Court, it belongs, and secondly to eliminate the almost strict liability of the vessel.

In *Howlett*, Justice Kennedy's formulation of the first *Scindia* duty, the turnover duty, and its corollary, the turnover duty to warn, is, to use his own word, "narrow". He articulated what is known as the turnover duty as follows:

> A vessel must exercise ordinary care under the circumstances to turn over the ship and its equip-

> ment and its appliances in such condition that an expert and experienced stevedoring contractor, mindful of the dangers he should expect to encounter, arising from the hazard of the ship's service or otherwise, will be able by the exercise of ordinary care to carry on cargo operations with reasonable safety to person and property.

The corollary was stated thus:

> A corollary to the turnover duty requires the vessel to warn the stevedore of any hazards on the ship, or with respect to its equipment, so long as the hazards are known to the vessel, or should be known to it in the exercise of reasonable care, and would likely be encountered by the stevedore in the course of his cargo operations, are not known by the stevedore, and would not be obvious to or anticipated by him if reasonably competent in the performance of his work.

His summary reads as follows:

> In sum, the vessel's turnover duty to warn of latent defects in the cargo stow and cargo area is a narrow one. The duty attaches only to latent hazards, defined as hazards that are not known to the stevedore and that would neither be obvious to nor anticipated by a skilled stevedore in the competent performance of its work. Furthermore, the duty encompasses only those hazards that are known to the vessel or should be known to it in the exercise of reasonable care.

(*Howlett*, at 114 S. Ct. 2063, 2067; citations and quotation

marks omitted.)

It should be noted that there were no disjunctives used in the expression of these rules by Justice Kennedy. The conjunctive "and" is used throughout. Most importantly, the test is stated in terms of a "latent hazard" that is not known to the stevedores *and* would neither be obvious nor anticipated. Under the teaching of *Scindia*, as clarified and restricted by *Howlett*, there can clearly be no liability on the part of a vessel interest if the alleged danger is not hidden.

In spite of Justice Kennedy's description of these duties as "related", the Louisiana Fourth Circuit irreconcilably separated them. Part of this separation was the court's flat statement that, although the open and obviousness of the alleged danger is a complete defense to a claim based on the breach of the corollary to the first *Scindia* duty, it is not a defense to a claim under the first duty itself. (See pages 3 and 4 of the Opinion at Appendix E). In other words, it may be a defense to the turnover duty to warn but not to the turnover duty itself. With respect, this makes no sense and is an incorrect statement of the law.

ENSIDESA submits that if this were a correct statement of the law, there would have been no reason for this Court to have issued the Writ, and to do it on the terms that it did. The Louisiana Fourth Circuit's original decision was based on ARCASA's and ENSIDESA's breach of the first *Scindia* duty, *i.e.* the turnover duty. If the open and obviousness of the hazard was not a defense to a claim based on a breach of this duty, why would this Court have ordered that the judgement be vacated and the case recon-

sidered in the light of *Howlett*? In other words, if this Court meant the defense only to apply to the corollary, and there was no breach of the corollary duty in this case, there would have been no reason to grant the Writ and vacate the judgment.

Moreover, there is also the ruling in the case of *Riggs v. Scindia Steam Navigation Co. Ltd.*, 8 F.3d 1442 (9th Cir. 1993), vacated, 512 U.S. ____, 114 S. Ct. 2701, 129 L.Ed.2d 830 (1994), which indicates that the open and obviousness of the alleged hazards are a defense to claims under both the turnover duty and the turnover duty to warn. In *Riggs*, the United States Court of Appeals for the Ninth Circuit reversed the district court's summary judgment which absolved the vessel from liability for breach of the turnover duty because the condition of the stow was open and obvious. The Ninth Circuit concluded that the onloading stevedore had stowed the cargo improperly, but the cargo was placed in the vesel's hold in an open and obviously hazardous manner. The district court had found that the vessel interests had no legal duty to prevent or alleviate the unsafe working conditions in the hold because the dangers were open and obvious to the longshore workers. In his appeal, plaintiff Riggs argued that the turnover duty to warn is distinguishable from the turnover duty to correct hazardous conditions in the stow, otherwise known as the turnover duty of "safe condition", *i.e.* the first *Scindia* duty. He also argued that the vessel had an obligation to correct open and obvious hazardous conditions. A breach of this duty would lead to liability, according to Riggs. In other words, the open and obvious nature of the hazard is not a defense to a claim for breach of the turnover duty of safe condition itself, as opposed to the corollary duty to

warn.

The Ninth Circuit agreed with Riggs, finding that the turnover duty of safe condition extended to protect discharging longshoremen against open and obvious hazards in the cargo stow, as a matter of law. Thus, the open and obvious nature of the hazard in the eyes of the Ninth Circuit, was not a defense to the breach of the first *Scindia* duty. Because of the split in the circuits on this issue, this Court granted the vessel's Application for a Writ of Certiorari, and on the same day as the Writ was issued in this case, vacated the Ninth Circuit's judgment and remanded the case for further consideration in the light of *Howlett.* As a result, the Ninth Circuit issued the following order on remand:

> The Supreme Court vacated our opinion, reprinted at 8 F.3d 1442, and remanded the case to this Court for further consideration of *Howlett v. Birkdale Shipping Co. S.A.*, 114 S. Ct. 2057, 2064 (1994). Accordingly, consistent with the *Howlett* decision, we now affirm the district court's grant of summary judgment to the vessel. The district court's decision is AFFIRMED.

See: 35 F.3d 1466, (9th Cir. 1994).

The Ninth Circuit has, with respect, properly interpreted *Howlett* to mean that the vessel interest's turnover duty of safe condition does not extend to open and obvious hazards in the stow. Moreover, according to *Howlett*, the turnover duty relates to the vessel and its equipment. The turnover duty to warn however, *may* extend to latent

hazards in the stow. *Id.* at 2064. The Louisiana Fourth Circuit simply glossed over this distinction without a backward glance. Thus, vessel interests have no duty to warn of *or* to correct hazards in the cargo stow that are open and obvious. The fact that the hazards are open and obvious is a defense to claims for breach of *both* the turnover duty to warn and the turnover duty itself. The Louisiana Fourth Circuit is incorrect in deciding that the defense is effective in only one instance and not the other.

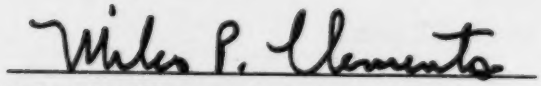
It is also clear that the Louisiana Fourth Circuit, in order to reach its desired result, changed its fact findings to fit within its interpretation of *Howlett*. Because the court felt precluded from deciding that there had been a breach of the turnover duty to warn by its own finding that the hazards in the stow were open and obvious, they confined themselves to the turnover duty itself. Having earlier found that both ARCASA and ENSIDESA had breached this duty, and refusing to concede that the open and obvious nature of the hazards in the stow had any bearing on the turnover duty itself, they found a way to absolve ARCASA by simply declaring that their involvement in the stow was "minimal", thus giving them a method to erase a 15% finding of fault that they had earlier affirmed. ENSIDESA's liability was not only affirmed, but was increased to 100%. With respect, it is submitted that this violates the Writ issued by this Court on June 20, 1994.

The Louisiana Fourth Circuit should be ordered to vacate its amended judgment, and again be instructed to follow the ruling in *Howlett*, which will result in the correct finding, namely that because of the open and obvious condition of any hazards in the stow there can be no liability to a longshoreman.

CONCLUSION

ENSIDESA submits that the Louisiana Fourth Circuit's decision ignores the parameters of this Court's prior Writ, and as such conflicts with the applicable decision of this Court. For these reasons ENSIDESA respectfully requests that the Court grant this Petition for Writ of Certiorari.

Respectfully submitted,



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APPENDIX A

SUPREME COURT OF THE UNITED STATES

NO. 93-1068

ARMADORES de CABOTAJE, S.A.,
Petitioner

v.

JERRY YOUNG

ORDER ALLOWING CERTIORARI. Filed June 20, 1994.

The petition herein for writ of certiorari to the Court of Appeal of Louisiana, Fourth Circuit, is granted.

APPENDIX B

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

June 20, 1994

Mr. Miles P. Clements
2100 Pan American Life Center
601 Poydras Street
New Orleans, LA 70130-6097

Re: Armadores de Cabotaje, S.A.
v. Jerry Young
No. 93-1068

Dear Mr. Clements:

The Court today entered the following order in the above entitled case:

The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the Court of Appeal of Louisiana, Fourth Circuit, for further consideration in light of Howlett v. Birkdale Shipping Co., S. A., 512 U. S. —— (1994).

Very truly yours,

/s/ William K. Suter

William K. Suter, Clerk

APPENDIX C

SUPREME COURT OF THE UNITED STATES

NO.

93-1068

ARMADORES de CABOTAJE, S.A.,
Petitioner

v.

JERRY YOUNG

ON WRIT OF CERTIORARI to the Court of Appeal of Louisiana, Fourth Circuit.

THIS CAUSE having been submitted on the petition for a writ of certiorari and response thereto,

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the judgment of the above court in this cause is vacated with costs and the case is remanded to the Court of Appeal of Louisiana, Fourth Circuit, for further consideration in light of *Howlett v. Birkdale Shipping Co., S.A.,* 512 U. S. ____ (1994).

IT IS FURTHER ORDERED that the petitioner Armadores de Cabotaje S.A., recover from Jerry Young ($300.00) Three Hundred Dollars for its costs herein expended.

June 20, 1994

Clerk's costs: $300.00

APPENDIX D

JERRY YOUNG	*	No. 90-C-1107
VERSUS	*	COURT OF APPEAL
ARMADORES de CABOTAJE, S.A. AND K & B EQUIPMENT COMPANY, INC.	*	FOURTH CIRCUIT
	*	STATE OF LOUISIANA

ORDER

On June 20, 1994 the United States Supreme Court vacated the decision rendered by this court in the above-numbered and entitled case and remanded the case to us for "further consideration in light of" *Howlett v. Birkdale Shipping Co., S.A.*, 512 U.S. ____ (No. 93-670, June 13, 1994).
Accordingly,

IT IS ORDERED that all parties in the above-numbered and entitled case file additional briefs within fifteen (15) days, if so desired, addressing this case only insofar as it may be affected by *Howlett v. Birkdale Shipping Co., S.A., supra*. Our reconsideration of this case will be strictly limited to issues affected by this recent U.S. Supreme Court decision. We will reconsider this case on the briefs only, with no further oral argument.

A TRUE COPY

NEW ORLEANS AUG 15 1994
/s/ Illegible, CLERK
COURT OF APPEAL FOURTH CIRCUIT

New Orleans, Louisiana this 15th day of August 1994.

/s CRW

Judge Charles R. Ward

/s/ JBA

Judge Joan Bernard Armstrong

/s/ SRP

Judge Steven R. Plotkin

APPENDIX E

JERRY YOUNG	No. 90-C-1107
versus	COURT OF APPEAL
ARMADORES de CABOTAJE, S.A. AND K & B EQUIPMENT COMPANY, INC.	FOURTH CIRCUIT
	STATE OF LOUISIANA

APPEAL FROM
CIVIL DISTRICT COURT, FOR THE
PARISH OF ORLEANS
NO. 84-17780, DIVISION "I"
HONORABLE BERNETTE, J. JOHNSON, JUDGE

JOAN BERNARD ARMSTRONG
JUDGE

(Court composed of Judge Charles R. Ward, Judge Joan Bernard Armstrong and Judge Steven R. Plotkin)

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NOV 17 1994

REVERSED IN PART:
AMENDED: AFFIRMED
AS AMENDED.

Plaintiff Jerry Young, a longshoreman, filed this suit pursuant to § 905(b), of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.*, against Armadores de Cabotaje, S.A. ("ARCASA") and Empresa Nacional Siderugica, S.A. ("ENSIDESA"). Defendants ARCASA and ENSIDESA appealed from a judgment in favor of plaintiff and on March 31, 1993 this court reversed the judgment of the trial court in part, amended it, and affirmed the judgment as amended.[1] On June 20, 1994 the United States Supreme Court granted ARCASA's application for writ of certiorari, vacated this court's decision, and remanded the case "for further consideration in light of *Howlett v. Birkdale Shipping Co.*, S.A., 512 U.S. (1994)."[2]

ENSIDESA manufactures steel beams in Spain. It chartered the M/V LORENA, owned by ARCASA, to ship a cargo of steel beams to the port of New Orleans. ENSIDESA loaded and stowed the cargo of beams in Spain. Cooper Stevedoring Company, Inc. ("Cooper") contracted with ENSIDESA to unload the beams in New Orleans. Plaintiff, an employee of Cooper, was injured in the cargo hold of the M/V LORENA while unloading the steel beams, Plaintiff claimed the cargo of steel beams had been improperly stowed, making it dangerous to unload and

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[1] *Young v. Armadores Cabotaje, S.A.*, 617 So.2d 517 (La. App. 4th Cir. 1993), *writs denied*, 625 So.2d 170, 171 (La. 1993), *cert. granted, vacated, remanded, Armadores de Cabotaje, S.A. v. Young*, 512 U.S. ____, 114 S.Ct. 2701, 129 L.Ed.2d 830 (1994).

[2] *Armadores de Cabotaje, S.A. v. Young*, 512 U.S. ____, 114 S.Ct. 2701, 129 L.Ed.2d 830 (1994).

resulting in his injury during the unloading process.[3]

In our original opinion we stated the law as set forth by the U.S. Supreme Court and interpreted by lower federal courts. We stated:

> In the seminal case of *Scindia Steam Navigation Co., Ltd. v. De Los Santos,* 451 U.S. 156, 101 S.Ct 1614, 68 L.Ed.2d 1 (1981), the U.S. Supreme Court defined the duties owed by a vessel owner to the stevedore and his longshoremen. These duties were succinctly stated by the 5th U.S. Circuit Court of Appeal in *Hill v. Texaco,* 674 F.2d 447, 450-51 (5th Cir. 1982):
>
> > First, *before the stevedore begins his work,* a shipowner must exercise care to make safe the portions of the ship that it turns over to the stevedore. In discharging this duty the ship may rely on the stevedore's performing its task with reasonable care. The shipowner must also warn the stevedore of hidden unsafe conditions on the ship of which the ship is, or should be, aware.
> >
> > Second, *once the stevedore begins its operations,* the shipowner has no general duty to supervise work or to inspect the area assigned to the stevedore, unless custom, contract, or law imposes such a duty on the shipowner. The shipowner need not monitor the stevedore's operations; rather, the shipowner is entitled to rely on the stevedore's expertise and reasonableness.

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[3] A full recitation of the facts is contained in our original opinion, 617 So.2d at 517.

> Third, the Supreme Court made an exception to the general absence of a duty of the shipowner to protect employees of the stevedore *during cargo operations.* The duty arises when two conditions are fulfilled. If the shipowner becomes aware during the stevedore's work that the ship or its gear poses a danger to the longshoremen, and *if* the shipowner also learns that the stevedore is acting unreasonably in failing to protect the longshoremen against the danger, then the shipowner acquires a duty to intervene and protect the longshoremen. The shipowner can have knowledge of a defect if the defect develops during the stevedore's operations and the shipowner had actual knowledge, or if the defect exists at the outset and the ship 'must be deemed' to have knowledge of it.
>
> (footnotes omitted) (emphasis ours)

In *Lemon v. Bank Lines, Ltd.*, 656 F.2d 110 (5th Cir. 1981), the U.S. Fifth Circuit described the judicial balancing of supervisory duties between the vessel owner and the stevedore:

> The shipowner is therefore responsible for eliminating dangerous conditions which exist at the outset of the stevedoring operations, but has 'no duty by way of supervision or inspection to exercise reasonable care to discover dangerous conditions that develop within the confines of the cargo operations.' It is the stevedore who must see to the safety of cargo operations. (citations omitted)

Id. at 115.

In *Lemon*, the court held that a vessel owner could be liable under *Scindia* if it knew or should have known of an improper loading technique and failed to take actions to either correct the stowage or warn the offloading stevedore's employees of the dangerous condition contained in the stow. *Lemon*, 656 F.2d, at 116. In *Harris v. Flota Mercante Grancolumbiana, S.A.*, 730 F.2d 296, 299 (5th Cir. 1984), the same court, citing *Lemon*, again held that a vessel owner could be held liable for negligently stowed cargo which caused an offloading longshoreman to be injured. See in accord, *Woods v. Sammisa Co., Ltd., supra.*

As in *Lemon* and *Harris*, we are concerned in the instant case not with conditions which develop *after* offloading stevedoring operations begin, but with a condition present when the vessel is turned over to the stevedore. The alleged negligence "occurred in the method and manner of stowing cargo that was delivered to the longshoremn and stevedore." *Harris, supra* at 299. Therefore, although the alleged dangerous condition caused by the crushed dunnage on the M/V LORENA became more apparent as the longshoremen got deeper into the stow, the second and third *Scindia* duties are not relevant to our analysis. The primary burden contemplated by *Scindia* was the duty of the vessel owner to turn over to the offloading stevedore a vessel which could be offloaded with reasonable safety. This is the focus of our analysis.

617 So.2d at 526, 527.

We found both ARCASA, as the shipowner, and ENSIDESA, as time-charterer and loading stevedore, liable for breaching the first *Scindia* duty, the duty to turn over (the "turnover duty") the ship in a condition such that an expert and experienced stevedore could, with the exercise of ordinary care, safely unload the cargo. We rejected any notion that either ARCASA or ENSIDESA breached a duty to warn of any hidden unsafe conditions, finding that the danger presented by the stow was open and obvious. We found that the evidence furnished a basis for a conclusion that the manner in which the beams had been stowed resulted in a condition presenting an unreasonable risk of harm to an expert and experienced unloading stevedore exercising ordinary care or reasonable safety. The evidence supported the finding that ARCASA had participated in preparing the stowage plans for the improperly stowed steel beams.

In *Howlett v. Birkdale Shipping Co., S.A.*, 512 U.S. ____, S.Ct. 2057, 129 L.Ed.2d 830 (1994), the U.S. Supreme Court granted certiorari in a case from the U.S. Court of Appeal for the Third Circuit "to resolve a conflict among the circuits regarding the scope of the shipowners' duty to warn of latent hazards in the cargo stow." *Id.* at 2062. While the Court's decision did not specifically address the turnover duty itself, only the duty to warn, it characterized the duty to warn as a "corollary" of the turnover duty. *Id.* at 2063. The decision made clear, as we stated in our original decision, that the duty to warn does not apply to conditions presenting an open and obvious danger, only to latent hazards. *Id.* at 2064.

In *Howlett* the Court rejected the suggestion that

a shipowner must make reasonable inspections during stevedoring operations (loading) to ensure a proper stow and to detect any hazards or defects before they become hidden, reasoning that such a duty "would require vessels to inject themselves into matters beyond their ordinary province," i.e., stevedoring operations, 114 S.Ct. at 2066. In reaching this conclusion the Court fully considered the role of the vessel and its crew in "preparing a stowage plan, which governs where each cargo will be stowed on the ship." *Id.* The Court also rejected the argument that the vessel need make reasonable inspections after the completion of loading stevedoring operations to discover hazards in the stow, stating that any such hazards would normally be discovered by a reasonably competent unloading stevedore. 114 S.Ct. 2066, 2067.

The *Howlett* Court distinguished the degree of operational control exercised over the cargo stow with that exercised over the ship itself, its gear, equipment and tools. In *Howlett* the U.S. Supreme Court evidences a clear intent to narrowly limit the liability of a vessel owner under 33 U.S.C. § 905(b) for injuries incurred as a result of a dangerous cargo stow. This court's affirmation of the finding of liability on the part of ARCASA was primarily based on its participation in preparing the stowage plan. The 15% of the total fault attributed to ARCASA by the jury, which was affirmed by this court, reflects the minimal role of the vessel owner.

Considering the clear thrust of *Howlett*, we conclude that the minimal role played by ARCASA in participating in the preparation of the stowage plan which detailed the placement and levelling of the cargo - not whether the

beams were to be stowed on the "H" (the cause of the dangerous condition in the stow) - is not sufficient to support a finding of liability as to ARCASA. ENSIDESA, both the time-charterer of the vessel and the loading stevedore, is solely and directly responsible for the dangerous condition presented by the cargo which it alone stowed on the M/V LORENA. The judgment of the trial court will be amended accordingly.

For the foregoing reasons, together those set forth in our original decision not inconsistent with the foregoing, we reverse that portion of the trial court judgment finding defendant Armadores de Cabotaje, S.A. 15% at fault and render judgment in favor of defendant Armadores de Cabotaje, S.A. and against plaintiff Jerry Young, dismissing with prejudice all of his claims against that company as well as any cross claims against it. We further amend the judgment of the trial court to render judgment in favor of plaintiff Jerry Young and against defendant Empresa Nacional Siderugica, S.A. for all damages to plaintiff Jerry Young. We further amend the judgment of the trial court to award damages to plaintiff Jerry Young, excluding past medical expenses,[4] as follows:

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[4] The issue of past medical expenses was not submitted to the jury and is not at issue on appeal.

Future medical expenses:	$ 274,949.00
Past physical and mental pain and suffering and disability from date of accident to date of trial:	$ 250,000.00
Future physical and mental pain and suffering and disability	$ 250,000.00
Past loss of earnings or earning capacity from date of accident to trial:	$ 141,365.00
Future loss of earnings or earning capacity:	$ 189,732.00
TOTAL	$1,106,046.00

We affirm the judgment as amended and in all other respects.

REVERSED IN PART: AMENDED: AFFIRMED AS AMENDED.

APPENDIX F

COURT OF APPEAL, FOURTH CIRCUIT
STATE OF LOUISIANA

Clerk's Office, New Orleans, Dec 13, 1994

DEAR SIR:

REHEARING WAS THIS DAY REFUSED
IN THE CASE ENTITLED

JERRY YOUNG v. ARMADORES de CABOTAJE, S.A.,
ET AL,

No. 90-CA-1107

Very truly yours,

DANIELLE A. SCHOTT
CLERK OF COURT

APPENDIX G

THE SUPREME COURT OF THE STATE OF LOUISIANA

JERRY YOUNG

VS. NO. 95-C - 0113

ARMADORES de CABOTAJE,
S.A. AND K & B EQUIPMENT COMPANY, INC.

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IN RE: Empresa Nacional SiderurgicaSA; - Defendant(s); Applying for Writ of Certiorari and/or Review; Parish of Orleans Civil District Court Div. "I" Number 84-17780; to the Court of Appeal, Fourth Circuit, Number 90CA-1107

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March 10, 1995

Denied.

JPV
PFC
WFM
JLD
JCW
HTL
CDK

JOHNSON, J. not on panel; recused.

Supreme Court of Louisiana
March 10, 1995

/s/ Illegible

Clerk of Court
For the Court